



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: October 25, 2011

CBCA 1656-ISDA, 1657-ISDA

RAMAH NAVAJO SCHOOL BOARD, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Michael P. Gross of M.P. Gross Law Firm, P.C., Santa Fe, NM; and Daniel H. MacMeekin, Washington, DC, counsel for Appellant.

Jeffery C. Nelson and Sabrina A. McCarthy, Office of the Solicitor, Department of the Interior, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STERN**, and **WALTERS**.

WALTERS, Board Judge.

Ramah Navajo School Board, Inc. (RNSB) contracted with the Department of the Interior's (DOI) Bureau of Indian Affairs (BIA), to operate BIA's Housing Improvement Program (HIP), pursuant to the Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. No. 93-638, codified as amended at 25 U.S.C. §§ 450, *et seq.* (2006). In these appeals, RNSB seeks contract support funds (CSF) for fiscal year (FY) 2007 and FY 2008 that it claims DOI failed to pay. RNSB has moved for summary relief, asserting that BIA incorrectly removed from the direct cost base to which negotiated indirect cost rates were to be applied, the costs it incurred for HIP construction supplies and materials, improperly characterizing such costs as pass-through costs and thus reducing the amount of CSF it was paid for each of the two years. Appellant, in addition to seeking the CSF it was

not provided, also seeks interest (under the Prompt Payment Act and Contract Disputes Act (CDA)) and attorney fees under the Equal Access to Justice Act (EAJA). These requests will be addressed below.

DOI opposes the motion and has cross-moved for summary relief, asserting that, under the applicable law, guidelines, and contract terms, the BIA awarding official properly classified construction supplies and materials as pass-through costs. For the reasons set forth below, we grant appellant's motion for summary relief and deny respondent's motion for summary relief, thereby granting the appeal.

Background

Congress enacted the ISDA in 1975 to promote Indian autonomy and self-governance by allowing tribes to manage federally-funded programs that would otherwise be administered by the Federal Government (in this case the DOI). *See Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005); 25 U.S.C. § 450a. When a tribe wishes to assume operation of a federally-funded program, it enters into a "self-determination contract" with DOI. *Id.* § 450b(j). Under such a contract, DOI is required to provide to the tribe contract funds equal to the amount that DOI would have expended for program operation if it directly operated the program. *Id.* § 450j-1(a)(1). This amount is called the "Secretarial amount" or "tribal share."

Congress amended the ISDA in 1988 to authorize DOI to provide funding for additional administrative costs ("contract support costs"). *Id.* § 450j-1(a)(2). Contract support costs (CSC) are costs DOI would not have usually incurred in running a particular program, but that tribes reasonably incur in administering the program. 25 U.S.C. § 450j-1(a)(2). The ISDA specifically limits which items can be characterized as CSC to reasonable and allowable costs of direct program expenses (direct CSC), and any additional administrative or other expense related to the overhead incurred in connection with the operation of a federal program (indirect CSC). *Id.* § 450j-1(a)(3)(A). Indirect CSC are "costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved." *Id.* § 450b(f). The amount of indirect CSC to which a tribal contractor is entitled is based upon an indirect cost rate, which is "arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency." *Id.* § 450b(g).

Findings of Fact

Based upon the parties' statements of undisputed facts set forth in the cross-motions for summary relief, the parties' exhibits to the motions, and the appeal file and supplement, the following material facts appear to be undisputed.

1. RNSB contracted with the BIA to operate housing under the HIP pursuant to the ISDA. Appellant's Statement of Undisputed Facts (Appellant's Facts) 2, 3. In its work, RNSB constructs houses for Indian beneficiaries of the program. Appellant's Fact 6. RNSB usually employs a work crew of five Ramah Navajos to construct these houses. Appellant's Fact 7.

2. RNSB operated this HIP program, along with several other BIA programs, pursuant to contract CTM75X00114 (contract). Under the contract, RNSB and BIA entered into an annual funding agreement (that BIA offers and RNSB accepts), which delineates the amount of funds BIA will provide to RNSB to cover the costs of running its programs. Respondent's Statement of Uncontested Facts (Respondent's Facts) 2, 4.

3. The funding agreements include an indirect cost rate, which is taken from RNSB's indirect cost negotiation agreements with DOI's National Business Center (NBC). Respondent's Fact 4. Each year, NBC negotiates and establishes an indirect cost rate based upon cost proposals submitted by RNSB. Respondent's Fact 4; Appellant's Facts 9-14. RNSB's cost proposals to NBC consist of a breakout of the amount of CSF that is needed to support the different types of programs RNSB operates. Respondent's Fact 4; Appellant's Motion for Summary Relief (Appellant's Motion), Exhibits 4-6.

4. To calculate RNSB's indirect CSF entitlement each year, the BIA awarding official applies the negotiated indirect cost rate to the direct cost base. Respondent's Facts 4, 6. Unlike in previous years, for years 2007 and 2008, the awarding official deducted RNSB's costs for HIP construction supplies and materials from the direct cost base before applying the indirect cost rate. Respondent's Fact 6; Appellant's Facts 22, 27. As a result, RNSB received significantly smaller amounts of indirect CSF from BIA for FY 2007 and FY 2008 than it would have received had the awarding official kept construction supplies and materials in the negotiated direct cost base. Appellant's Facts 20-24, 26-31.

5. For FY 2007, RNSB was awarded \$701,624 in HIP direct cost program funds Appellant's Fact 20. Of this amount, \$260,000 was for HIP construction supplies and

materials,¹ which the awarding official chose to reclassify as pass-through funds. *Id.* Based on this reclassification, the awarding official deducted this \$260,000 amount from the direct cost base before applying the negotiated indirect cost rate of 16.30%. Appellant's Facts 21-22. This would have resulted in the provision of indirect CSF of \$71,985. However, in 2007, BIA paid each ISDA contractor only 94.847% of its determined entitlement, or \$68,275, because of a national appropriations shortfall. Appellant's Fact 21. This amount was \$40,196 less than it would have been had the construction supplies and materials and consultant fees not been deducted. Appellant's Fact 23.

6. For FY 2008, RNSB was awarded \$371,005 in HIP direct cost program funds. Appellant's Fact 26. Of this amount, \$185,507 was for HIP construction supplies and materials, which the awarding official chose to reclassify as pass-through funds. *Id.* Based on this reclassification, the awarding official deducted \$185,507 from the direct cost base before applying the negotiated indirect cost rate of 18.95%. Appellant's Fact 27. As a result, RNSB's final HIP indirect CSF entitlement for 2008 was \$35,152 – i.e., \$35,154 less than it would have been had the construction supplies and materials not been deducted from the direct cost base. Appellant's Facts 28-30. BIA only paid RNSB \$14,296 of this amount, leaving a balance of \$20,856 under DOI's calculations. Appellant's Fact 30. Had DOI not deducted construction supplies and materials from the direct cost base, RNSB would have been due \$70,305 in CSF, of which \$14,296 has been paid, leaving a claim amount of \$56,009.

7. For both FY 2007 and 2008, BIA awarded HIP direct cost program funds for salary and wages of RNSB personnel (including HIP coordinator, administrative assistant, construction foreman, and construction laborers), fringe benefits for RNSB HIP coordinator and administrative assistant, construction supplies and materials, travel costs, vehicle lease expense, office supplies, and utility charges. Respondent's Facts 7-11. For both years, through application of the negotiated indirect cost rates, BIA also awarded RNSB indirect CSF on top of such direct program costs, but provided no CSF for the costs of construction supplies and materials, which the awarding official decided to exclude as pass-through costs. *See* Respondent's Fact 12.

¹ The awarding official included \$20,000 of consultant expenses as part of the \$260,000 in construction supplies and materials costs.

Parties' Positions

RNSB contends that the BIA awarding official had no authority to reclassify and remove from the direct cost base categories of direct costs that were submitted by RNSB to NBC, and upon which the negotiated indirect cost rates were computed for the two years at issue. RNSB argues that the awarding official's discretion is limited to reviewing the CSC request to identify any cost that is duplicative of funding incurred by the Secretary of the Interior in the operation of the program or duplicative of other funding within the CSC amount. In this regard, respondent has not asserted the existence of any cost duplication. RNSB further maintains that the costs of construction supplies and materials are not pass-through costs within the contemplation of applicable regulations and guidance.

For its part, DOI asserts that the awarding official had authority to review the CSC request submitted to NBC by RNSB and determine whether costs were properly classified before applying the indirect cost rate. DOI asserts that the costs of construction supplies and materials here were pass-through costs, because they were paid for by money that is channeled through RNSB to outside vendors, with minimum administrative effort. As such, DOI maintains, the awarding official was required to exclude these costs from the direct cost base before applying the indirect cost rates.

Discussion

Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the burden of demonstrating the absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All reasonable inferences must be drawn in favor of the non-moving party. *Anderson*, 477 U.S. at 255. In a case such as this, where cross-motions have been filed by both parties, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 181-ISDA, et al., 09-2 BCA ¶ 34,307, at 169,466, *reconsideration denied*, 10-2 BCA ¶ 34,475. The mere fact that the parties have cross-moved for summary relief does not impel a grant of one of the motions; each motion must be independently assessed on its own merits. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001); *Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316, at 169,505 (2009).

The ISDA authorizes the Government to pay “reasonable and allowable” direct costs and indirect CSC. 25 U.S.C. § 450j-1(a)(3)(A). Congress has repeatedly voiced its concern with the Government’s past failure to adequately reimburse tribes’ indirect costs. *See, e.g.*, 25 U.S.C. § 450j-1(a), (d)(2); *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 642-45 (2005); *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1344-45 (D.C. Cir. 1996).

Office of Management and Budget (OMB) Circular A-87, “Cost Principles for State, Local, and Indian Tribal Governments,” establishes principles and parameters for the recovery of costs incurred under, *inter alia*, ISDA contracts. 2 CFR pt. 225 (2011). The circular calls for recovery of indirect costs through the development and application of indirect cost rates to the direct costs within a selected direct cost base. An indirect cost rate, expressed as a percentage, is the ratio the total costs within an indirect cost pool – the numerator – bears to the total costs incurred within the selected direct cost base – the denominator – over a given period of time. 2 CFR pt. 225, app. E ¶ B.2. The direct cost base is to be selected and the rate is to be developed and applied so as to result in an award (ISDA contract or program) receiving its “fair share of the indirect costs in reasonable relation to the benefits received from the costs.” *Id.* ¶ B.4.

To implement OMB Circular A-87, the Department of Health and Human Services (HHS) issued guidance with respect to the cost principles on behalf of the Federal Government, in the form of an Implementation Guide, ASMB C-10 (formerly OASC-10). 2 CFR pt. 225, app. C ¶ A.2; Respondent’s Opposition, Exhibit 1. ASMB C-10 identifies two direct cost bases that may be used: total direct salaries and wages (S&W); and modified total direct costs (MTDC). ASMB C-10, pt. 6, att. E § 6.2.2. MTDC represent total direct costs less “any extraordinary or distorting expenditures,” “usually capital expenditure, subawards, contracts, assistance payments (e.g., to beneficiaries), and provider payments.” *Id.*

The DOI’s BIA in 2006 adopted a National Policy Memorandum on CSC to aid in the administration and provision of CSF. Appellant’s Motion, Exhibit 8. To calculate the amount of indirect CSC recoverable by awardees, awarding officials must “apply the negotiated [indirect cost rate(s)] to the appropriate direct cost base amount.” Appellant’s Motion, Exhibit 8 at 12. BIA has delegated to NBC responsibility for reviewing awardees’ indirect cost rate proposals and negotiating indirect cost rates. *Id.*, Exhibit 2 at 2. NBC internet-based guidance for preparing and submitting indirect cost proposals states that NBC reviews the proposed rate to ensure that it complies with applicable regulations and cites as a primary regulation OMB Circular A-87. *Id.*

Such NBC guidance defines a direct cost base as being “usually composed of either total direct costs less equipment and flow-through or pass-through costs” or “direct salaries and wages.” The guidance describes “flow-through/pass-through costs” as “major

subcontracts, payments to participants, stipends to eligible recipients, or subgrants that required minimal administrative effort or do not depend on the indirect cost pool for support.” Appellant’s Motion, Exhibit 2 at 4. The guidance further provides: “[I]f you were a Native American entity that set up its own tribal construction operation (force account) that benefited from the indirect cost pool, the [costs of the] construction operation should be included in the direct cost base” Appellant’s Motion, Exhibit 2 at 5.

Neither OMB Circular A-87, nor ASMB C-10, nor the above-described NBC guidance seem to envision costs for construction supplies and materials that are used directly by a tribe for its own construction projects as being encompassed within the excluded “extraordinary or distorting expenditures” or “flow-through/pass-through” costs. Although payments to major subcontractors might be considered as “flow-through/pass-through” costs under ISDA contracts, suppliers and materialmen generally are not to be equated to subcontractors, even for purposes of remedial statutes such as the federal Miller Act. *See United States ex rel. E&H Steel Corp. v. C. Pyramid Enterprises, Inc.*, 509 F.3d 184 (3rd Cir. 2007). And here, it is uncontested that RNSB did not subcontract out any part of its HIP work under the instant contract. It set up its own tribal construction operation. Thus, respondent appears to be incorrect in its assertion that RNSB’s costs for construction materials and supplies were properly excluded from application of the indirect cost rates, as pass-through costs.

More importantly, in terms of the authority of awarding officials with respect to determination of CSC reimbursement, BIA’s National Policy Memorandum instructs them to review the awardee’s “cost allocation plan and its associated [indirect cost] proposal and approved [indirect cost] negotiation agreement,” and to apply the negotiated indirect cost (IDC) rates in a manner that conforms to and is consistent with the IDC agreement:

The amount of IDC expected to be incurred by awardees using rates negotiated with the cognizant Federal agency will be determined by applying the negotiated rate(s) to the appropriate direct cost base amount. The amount determined as the awardee’s CSC requirement will be consistent with the individual awardee’s IDC rate agreement, reflecting any exclusions required by the IDC agreement.

Appellant’s Motion, Exhibit 8 at 12. The awarding official’s exclusion of construction supply and material costs in this case was in direct contradiction to this guidance. The guidance language “appropriate direct cost base amount” does not imply that the awarding official is authorized to second-guess NBC in its determination of which items are to be included in the direct cost base. To the contrary, the awarding official’s task is simply to assure that the indirect cost rate is not applied to costs excluded from the direct cost base under the agreement NBC negotiates with an awardee. The negotiated IDC rate agreement included the

costs of construction supplies and materials in the direct cost base, and the indirect cost rates should have been applied to those direct costs. As a matter of law, the BIA awarding official had no authority to do otherwise.²

In the present instance, there are no genuine issues of material fact to be tried. Based on the foregoing, summary relief in appellant's favor is appropriate. Conversely, summary relief in respondent's favor would be inappropriate.

Decision

Appellant's motion for summary relief is granted, and the appeal is consequently **GRANTED**. Appellant thus is entitled to recover a total of \$96,205, plus Prompt Payment Act interest and CDA interest as required by those statutes. Appellant's prayer for relief under EAJA was premature, but appellant may wish to pursue such relief under Board Rule 30. Respondent's motion for summary relief is denied.

RICHARD C. WALTERS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JAMES L. STERN
Board Judge

² Moreover, even if the costs of construction supplies and materials were properly determined to have been pass-through costs (which does not appear to be the case), to assure that the program here received its "fair share" of indirect cost reimbursement per OMB Circular A-87, exclusion of such costs from the direct cost base would have to have been from the denominator in the ratio used to compute the indirect cost rate percentages as well as from the pool of direct costs against which that rate percentage was to be applied. This would have resulted in significantly higher indirect cost rates for the two years in question.